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FLORIDA HOUSING FINANCE CORPORATION

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In re: HTG Paradise, LLC

FHFC CASE NO. 2020-012VW  
Application No. 2018-102C/2020-443C

**PETITION FOR VARIANCE FROM RULE 67-48.023(2), F.A.C.**

Petitioner, HTG Paradise, LLC (“Petitioner”), pursuant to Section 120.542, Florida Statutes, and Chapter 28-104, Florida Administrative Code, hereby petitions Florida Housing Finance Corporation (“Florida Housing”) for a variance from the provisions of Rule 67-48.023(2), F.A.C. (eff. 5-24-17) (the “Rule”) to allow it to utilize the Average Income Test to calculate its Minimum Set-Aside Commitment as allowed by the Internal Revenue Code section 42(g)(1)(C). A few months after submitting its application, both the Rule and Internal Revenue Code were amended such that all subsequent applications to Florida Housing for housing tax credits may use the Average Income Test. Petitioner respectfully requests to likewise be granted the ability to use the Average Income Test here. In support, Petitioner states as follows:

**I. Petitioner and the Development**

1. The name, address, telephone, and facsimile numbers for Petitioner and its qualified representative are:

HTG Paradise, LLC  
Attn: Matthew A. Rieger  
3225 Aviation Ave, 6<sup>th</sup> Floor  
Coconut Grove, FL 33133  
Telephone: 305-860-8188  
Fax: 305-639-8427  
E-mail: mattr@htgf.com

2. The name, address, telephone and facsimile numbers of Petitioner’s counsel are:

Brian J. McDonough, Esquire  
Stearns Weaver Miller Weissler  
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## II. Background.

### 3. General Development information:

- Development Name: Max's Landing
- Developer: HTG Paradise Developer, LLC
- County of Development: Miami-Dade
- Number of Units: 76
- Type: Garden
- Set Asides: 10% at 28% AMI and 90% at 60% AMI<sup>1</sup>
- Demographics: Family
- Funding Amounts: 9% Competitive Housing Credit allocation in the annual amount of \$1,517,634

4. On or about December 13, 2017, Petitioner submitted Application No. 2018-102C/2020-443C in response to RFA 2017-112 (Housing Credit Financing for Affordable Housing Developments Located in Miami-Dade County) and successfully applied for an allocation of competitive housing credits to assist in the construction of Max's Landing f/k/a Paradise Lake Apartments (the "Development").

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<sup>1</sup> The application references set asides at these amounts. However, if this Petition is granted, Petitioner will use the Average Income Test to calculate the set-aside commitment as permitted by Internal Revenue Code section 42(g)(1)(C).

5. Petitioner and Florida Housing entered into the carryover allocation agreement on November 9, 2018, which required the Development to be placed in service by December 31, 2020.

6. Petitioner determined that it would not be able to meet the December 31, 2020 placed-in-service deadline due to delays outside of Petitioner's control. Specifically, progress on the development was delayed by an Environmental Review and Clearance from the U.S. Department of Housing and Urban Development (HUD) related to Housing Development Action Grant (HODAG) funding. Petitioner was unable to commence this process until Miami-Dade County approved the subordinate HODAG financing, which was eventually approved on July 23, 2019. Petitioner received final HUD Environmental Review and Clearance approval on January 19, 2020.

7. Accordingly, on December 20, 2019, Petitioner filed a Petition for Waiver of the Qualified Allocation Plan's Requirement for Returning Housing Credit Allocations and Rule 67-48.002(95), Florida Administrative Code (2017), to exchange its 2018 housing credits for 2020 housing credits.

8. The Florida Housing Board granted the waiver, which extended the placed-in-service date of the Development until December 31, 2021.

9. Petitioner here seeks a waiver to utilize the Average Income Test to calculate its Minimum Set-Aside Commitment as allowed by the Internal Revenue Code section 42(g)(1)(C).

### **III. Type of Waiver**

10. The waiver being sought is permanent in nature.

### **IV. Rule For Which a Variance Is Requested**

11. Petitioner seeks a variance in relation to Rule 67-48.023(2), F.A.C. (5-24-17), which provides:

Each Housing Credit Development shall comply with the minimum Housing Credit Set-Aside provisions, as specified in Section 42(g)(1) of the IRC, with respect to the reservation of 20 percent of the units for occupancy by persons or families whose income does not exceed 50 percent of the area median income, or the reservation of 40 percent of the units for occupancy by persons or families whose income does not exceed 60 percent of the area median income. Further, each Housing Credit Development shall comply with any additional Housing Credit Set-Aside committed to by the Applicant in the Application.

Petitioner's submitted its application on December 13, 2017. Prior to March 23, 2018, the Section of the IRC referenced above did not allow income averaging, and therefore Rule 67-48.023(2), F.A.C. (eff. 5-24-17) also did not allow income averaging.

**V. Statutes Implemented by the Rules**

12. The Rule implements Section 420.5099, Florida Statutes, relating to the allocation of Low-Income Housing Tax Credits.

**VI. Justification for Granting Waiver of the Rules**

13. During its 2018 session, the United States Congress passed the "Consolidated Appropriations Act, 2018" ("H.R. 1625"), which was signed into law on March 23, 2018. H.R. 1625 created a new subsection C within Section 42(g)(1) of the IRC, which states as follows:

**(C) AVERAGE INCOME TEST. –**

(i) **IN GENERAL. –** The project meets the minimum requirements of this subparagraph if 40 percent or more (25 percent or more in the case of a project described in section 142(d)(6)) of the residential units in such project are both rent-restricted and occupied by individuals whose income does not exceed the imputed income limitation designated by the taxpayer with respect to the respective unit.

(ii) **SPECIAL RULES RELATING TO INCOME LIMITATION. -**  
For Purposes of clause (i)

(I) **DESIGNATION. -** The taxpayer shall designate the imputed income limitation of each unit taken into account under such clause

(II) AVERAGE TEST.- The average of the imputed income limitations designated under subclause (I) shall not exceed 60 percent of area median gross income

(III) 10-PERCENT INCREMENTS. - The designated imputed income limitation of any unit under subclause (I) shall be 20 percent, 30 percent, 40 percent, 50 percent, 60 percent, 70 percent, or 80 percent of area median gross income.”  
Section 42(g)(1)(C), I.R.C. (2018)

The Rule was revised on July 8, 2018 to incorporate the new subsection 42(g)(1)(C) of the IRC. As a result, any applications for housing tax credits submitted to Florida Housing after July 8, 2018 are allowed to use the income averaging provisions of the IRC.

14. Petitioner’s application was submitted prior to the July 8, 2018 rule revisions and was therefore not allowed to take advantage of the Average Income Test. It would violate principles of fairness and put Petitioner at a competitive disadvantage with other developments if it was not allowed to use the Average Income Test solely due to its application submission date.

15. Under Section 120.542(1), Florida Statutes, Florida Housing has the authority to grant waivers to, or variances from, its requirements when strict application of the requirements would lead to unreasonable, unfair, and unintended consequences in particular instances. Specifically, Section 120.542(2) states:

Variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of a rule would create a substantial hardship or would violate principles of fairness. For purposes of this section, “substantial hardship” means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver. For purposes of this section, “principles of fairness” are violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule.

Granting the requested variance in this instance would allow Petitioner to utilize the Average Income Test as permitted pursuant to the Internal Revenue Code. The controlling statutes and

Florida Housing's Rules are designed to allow the flexibility necessary to provide relief when strict application, in particular circumstances, would lead to unreasonable, unfair, or unintended results.

15. Additionally, by granting this waiver, Florida Housing would recognize the goal of increasing the supply of affordable housing and recognize the economic realities and principles of fundamental fairness in developing affordable rental housing. The purpose of the underlying statute, which is to "encourage development of low-income housing in the state" as identified in §420.5099(2), Fla. Stat., would still be achieved if the variance is granted.

16. In this instance, Florida Housing has jurisdiction to grant a waiver of the Rules and Petitioner meets the standards for a waiver of the Rules.

**VII. Action Requested**

17. WHEREFORE, Petitioner respectfully requests that Florida Housing:

- a. Grant this Petition and all relief request therein;
- b. Grant a variance from Rule 67-48.023(2), F.A.C. (5-24-17) and allow for calculation of the minimum set aside percentage based on income averaging; and
- c. Grant such further relief as may be deemed appropriate

Respectfully submitted this 17<sup>th</sup> day of March, 2020.

STEARNS WEAVER MILLER WEISSLER  
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By:           s/Brian J. McDonough

**CERTIFICATE OF SERVICE**

The Petition is being served via e-mail for filing with the Corporation Clerk for the Florida Housing Finance Corporation, CorporationClerk@FloridaHousing.org, with copies served by U.S. Mail on the Joint Administrative Procedures Committee, Pepper Building, Room 680, 111 West Madison Street, Tallahassee, Florida 32399-1400, this 17th of March, 2020.

*s/ Brian J. McDonough* \_\_\_\_\_  
BRIAN J. MCDONOUGH, ESQ.